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APPIAN CONSTRUCTION CO., INC. and  
1221 MONTICELLO, L.P.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

NIC INSURANCE COMPANY, a New  
York corporation

Plaintiff,

vs.

APPIAN CONSTRUCTION CO., INC., a  
California corporation; 1221  
MONTICELLO, L.P., a California Limited  
Partnership; and DOES 1 through 50,  
inclusive

Defendants.

CASE NO. C-07-05988 EMC

**NOTICE OF PENDENCY OF OTHER  
ACTIONS OR PROCEEDINGS  
[Civil L.R. 3-13]**

**1. Underlying Construction Defect Case.**

Pursuant to Civil L.R. 3-13, Defendants Appian Construction Co., Inc. (“**Appian**”) and  
1221 Monticello, L.P. (“**Monticello**”), who are sometimes collectively referred to herein as  
“**Defendants**,” hereby respectfully notify the Court that a case that is related to the instant case is  
now pending in Contra Costa County Superior Court entitled *Geoffrey and Kathy Manley v.*  
*Appian Construction Co., Inc.; and 1221 Monticello, LP; et al.*, Contra Costa County Superior  
Court Case No. C05-00358, hereinafter referred to as the “**Construction Defect Case**.” That

1 action was filed on or about February 28, 2005. The Construction Defect Case was brought by  
 2 the owners of a single family residence against Monticello, which sold the home to the  
 3 homeowners, and against Appian, which was the general contractor for the construction of the  
 4 home. In their Third Amended Complaint in the Construction Defect Case, the plaintiff  
 5 homeowners sued the same entities that are Defendants in the instant case – Appian and  
 6 Monticello. Plaintiff asserted a cause of action for negligence against Appian and Monticello,  
 7 for strict liability against Appian, and for breach of contract against Monticello. The plaintiffs in  
 8 that case are seeking damages in the form of costs of repair, relocation costs, loss of market value,  
 9 loss of use and investigation costs, among other things. A copy of the Third Amended Complaint  
 10 in that related case is attached hereto as Exhibit “A.” The following are the key facts regarding  
 11 the scheduling of the Construction Defect Case

- 12 • **Trial Date:** None Set;
- 13 • **Mediation:** April 9, 2008;
- 14 • **Percipient witness discovery:** Not yet completed. Trial court instructed parties  
 15 on February 5, 2008, to meet and confer regarding preparation of a Case  
 16 Management Order, and report back to the Court on February 29, 2008;
- 17 • **Expert designations:** Not yet complete;
- 18 • **Expert depositions:** Not yet started.

## 19 **2. Relation of the Construction Defect Case to the Instant Case.**

20 In the instant case, Plaintiff NIC Insurance Co. is an insurance carrier which issued liability  
 21 insurance policies to Defendants, and is seeking a judgment declaring that Plaintiff NIC has no  
 22 duty to indemnify Defendants against any judgment in the Construction Defect Case. Defendants  
 23 respectfully submit that it is premature for the Plaintiff insurance carrier in the instant case to seek  
 24 a judgment declaring that Plaintiff has no duty to indemnify Defendants against any judgment in  
 25 the Construction Defect Case because no judgment has been entered and it is impossible to know  
 26 at this time what such a judgment, if any, might be for. Indeed, as stated above, no trial date has  
 27 been set in that case. Further, allowing percipient and expert witness depositions to proceed in  
 28 the instant case could prejudice Defendants in the Construction Defect Case, particularly given

1 that percipient witness depositions are not yet complete in that case, and expert depositions have  
2 not yet even started. Defendants therefore respectfully submit that the instant case should be  
3 stayed or dismissed without prejudice pending resolution of the Construction Defect Case.  
4 Defendants' counsel are conferring with Plaintiff's counsel regarding this issue.

5 Respectfully submitted,

6 DATED: February 6, 2008

JACKSON, DeMARCO, TIDUS,  
PETERSEN & PECKENPAUGH

9 By: s/Bradley R. Mathews

10 Bradley R. Mathews  
11 Attorneys for Defendants  
Appian Construction Co., Inc. and  
1221 Monticello, L.P.

## **EXHIBIT A**

CRAIG L. JUDSON - 114926  
 Bold, Polisner, Maddow, Nelson & Judson  
 A Professional Corporation  
 500 Ygnacio Valley Road, Suite 325  
 Walnut Creek, CA 94596  
 (925) 933-7777 - telephone  
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Attorneys for Geoffrey and Kathy Manley

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 COUNTY OF CONTRA COSTA, CALIF.

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WOOD SMITH HENNING & BERMAN LLP

SUPERIOR COURT OF CALIFORNIA  
 IN AND FOR THE COUNTY OF CONTRA COSTA

GEOFFREY AND KATHY MANLEY, )  
 Plaintiffs, )  
 vs. )  
 APPIAN CONSTRUCTION CO., INC., )  
 1221 MONTICELLO, LP, HDO )  
 ARCHITECTS PLANNERS, HUMANN )  
 COMPANY, INC., TABOR )  
 ENGINEERING ARCHITECTURAL )  
 CONSULTANTS, INC., d.b.a. TEAC )  
 CONSULTING ENGINEERS, GIROVAS )  
 LANDSCAPE CONSTRUCTION, INC., )  
 LAWRENCE D. SHERMAN, Inc., and )  
 DOES 1 through 25, inclusive, )  
 Defendants )

CASE NO: C05-00358

**THIRD AMENDED COMPLAINT  
 FOR DAMAGES**

**GENERAL ALLEGATIONS**

1. Plaintiffs Geoffrey and Kathy Manley are and at all times mentioned in this complaints were individuals residing in Contra Costa County. They are the owners of the residential real property located at 3918 Los Arabis Drive, Lafayette, California ("the Subject Property.")
2. Defendant Appian Construction, Inc. (Hereinafter "Appian"). is now and at all times

1 mentioned in this complaint a corporation organized and existing under the laws of  
2 the State of California, with its principal place of business in Contra Costa County,  
3 California. Plaintiffs are informed and believe that defendant Appian constructed  
4 the Subject Property.

5 3. Defendant 1221 Monticello LP (hereinafter "1221 Monticello") is now, and at all  
6 times mentioned in this complaint was, a California Limited Partnership duly  
7 organized and existing under the laws of the State of California, with its principal  
8 place of business in Contra Costa County, California. Plaintiffs are informed and  
9 believe that defendant 1221 Monticello was the owner and developer of the Subject  
10 Property, and sold the Subject Property to the Plaintiffs.

11 4. Defendant HDO Architect Planners (hereinafter "HDO") is now and at all times  
12 mentioned in this complaint a business entity of unknown form and at all times  
13 relevant herein was doing business in the County of Contra Costa, California.  
14 Plaintiffs are informed and believe that HDO provided architectural services for the  
15 design of the Subject Property.

16 5. Defendant Humann Company, Inc., (hereinafter "Humann") is now and at all times  
17 mentioned in this complaint a business entity of unknown form and at all times  
18 relevant herein was doing business in the County of Contra Costa, California.  
19 Plaintiffs are informed and believe that Humann provided civil engineering services  
20 for the design of the Subject Property.

21 6. Tabor Engineering Architectural Consultants, Inc. dba TEAC Consulting Engineers  
22 (hereinafter "TEAC") is now and at all times mentioned in this complaint a  
23 corporation organized and existing under the laws of the State of California, with its  
24 principal place of business in Contra Costa County, California. TEAC provided  
25 structural engineering services for the design of the Subject Property.

1 7. Lawrence D. Sherman, Inc. (hereinafter "Sherman") is now, and at all times  
2 mentioned in this complaint was, a corporation duly organized and existing under the  
3 laws of the State of California, and conducting business in Contra Costa County,  
4 California. Plaintiffs are informed and believe that Sherman provided construction  
5 services related to grading and drainage related activities at the Subject Property.

6 8. Giorvas Landscape Construction, Inc. (hereinafter "Giorvas") is now, and at all times  
7 mentioned in this complaint was, a corporation duly organized and existing under the  
8 laws of the State of California, and conducting business in Contra Costa County,  
9 California. Plaintiffs are informed and believe that Giorvas provided construction  
10 services related to grading, drainage, concrete flatwork, and retaining wall  
11 construction at the Subject Property.

12 9. The true names of defendants DOES 1 through 25, inclusive, are unknown to  
13 plaintiffs at this time. Plaintiffs sue these defendants by such fictitious names  
14 pursuant to section 474 of the Code of Civil Procedure. Plaintiffs are informed and  
15 believe, and based on that information and belief allege, that each of the defendants  
16 designated as a DOE is negligently or otherwise legally responsible for the events  
17 and happenings referred to in this complaint, and negligently or otherwise unlawfully  
18 caused the injuries and damages to plaintiffs alleged in this complaint. The names,  
19 capacities and relationships of DOES 1 through 50 will be alleged by amendment to  
20 this complaint when they are known.

21 10. Plaintiffs are informed and believe, and based on that information and belief allege,  
22 that at all times mentioned in this complaint, defendants were the agents and  
23 employees of their co-defendants, and in doing the things alleged in this complaint  
24 were acting within the course and scope of such agency and employment.

25 11. Plaintiffs are informed and believe, and based on that information and belief allege,



1 that at all times mentioned in this complaint, defendants Appian and 1221  
2 Monticello were and are in the business of developing real property into residential  
3 units for sale to the general public, both individually and with others. Plaintiffs are  
4 informed and believe, and based on that information and belief allege, that each of  
5 the remaining defendants participated in the development, design, engineering,  
6 investigation, inspection, grading, construction, marketing, and/or sale of the  
7 property.

### 8 9 FIRST CAUSE OF ACTION

10 (Negligence against Appian, 1221 Monticello,  
11 Giorvas, Sherman, and DOES 1-10)

12 12. Plaintiffs incorporate the allegations set forth in paragraphs 1 through 11 of the  
13 General Allegations as though set forth fully herein.

14 13. Plaintiffs are informed and believe, and based on that information and belief allege,  
15 that defendants and DOES 1-10 owned, developed, engineered, investigated, graded,  
16 constructed, marketed, and/or sold the property, and as such owed a duty of care to  
17 plaintiffs as purchasers of the Subject Property.

18 14. Plaintiffs are further informed and believe, and based on that information and belief  
19 allege, that defendants and DOES 1-10, and each of them, breached their duty of care  
20 to plaintiffs and failed to exercise reasonable care in that they failed to properly  
21 supervise, inspect, investigate, prepare, and construct the subject the subject  
22 residence at the property in that the house suffers from numerous defects, the most  
23 prominent of which includes the failure of part of all of the foundation systems  
24 causing the walls and floors to shift and move, the walls and floors and  
25 improvements attached thereto to break, crack, and/or crumble, windows and doors



1 not to operate properly, floors and walls to be out of level and plumb, retaining walls  
2 and concrete flatwork to move, and other work, all due to defendants', and each of  
3 their, failure to ensure that the Subject Property was adequately developed, failure to  
4 ensure the soil was adequately graded and compacted, failure to provide adequate  
5 pier support and foundation, failure to comply with applicable building codes and  
6 with the plans and specifications, failure to complete their work in a workmanlike  
7 manner according to the standard of care, as the case may be. Other defects exist in  
8 the property which plaintiffs have yet to discover.

9 15. As a direct and legal result of the negligence of the defendants, and each of them,  
10 the Subject Property is defective. Plaintiffs have been, and continue to be, damaged  
11 both in terms of the physical damage to the property and also in terms of physical  
12 and emotional bodily injury being suffered by Plaintiffs, all in an amount to be  
13 proven at trial.

14 16. As a further direct and legal result of the negligence of defendants, and each of  
15 them, plaintiffs will incur and/or have incurred repair costs, loss of use and loss of  
16 market value in an amount to be proven at trial.

17 17. As a further direct and legal result of the negligence of defendants, and each of  
18 them, plaintiffs have been required to expend sums of money to investigate and  
19 make temporary repairs to the Subject Property in an amount to be proven at trial.

20 WHEREFORE, plaintiffs pray for judgment against defendants, and each of them, as set  
21 forth below.

## 22 SECOND CAUSE OF ACTION

### 23 (Negligence Against TEAC and DOES 11-20)

24 18. Plaintiffs incorporate the allegations set forth in paragraphs 1 through 17, inclusive,  
25 as though fully set forth herein.

1 19. Defendants TEAC and Does 11-20 designed, engineered, and/or oversaw  
2 construction of the Subject Property, and in so acting, owed a duty of care to  
3 Plaintiffs to design, engineer, inspect, and oversee the construction of the Subject  
4 Property in accordance with applicable safety and building codes and acceptable  
5 standards of the industry.

6 20. Defendants TEAC and Does 11-20, and each of them, breached their duty of care to  
7 Plaintiffs and failed to act according to the standard of care, in accordance with the  
8 plans and specifications, and applicable safety and building codes. As a result, the  
9 Subject Property suffers from the defects alleged herein.

10 21. As a direct and legal result of the negligence of these defendants, and each of them,  
11 the Subject Property is defective and Plaintiffs have been, and continue to be,  
12 damaged in an amount to be proven at trial.

13 22. As a further proximate and legal result of the negligence of defendants TEAC and  
14 DOES 11-20, and each of them, plaintiffs have incurred, and will continue to incur  
15 repair costs, loss of use of and loss of market value in an amount to be proven at  
16 trial.

17 23. As a further proximate and legal result of the negligence of these defendants, and  
18 each of them, plaintiff has been required to expend sums to investigate and make  
19 temporary repairs to the Property in an amount to be proven at trial.

20 WHEREFORE, plaintiffs pray judgment against defendants, and each of them, as set  
21 forth below.

### 22 23 **THIRD CAUSE OF ACTION**

#### 24 **(Negligence against Humann and DOES 11-20)**

25 24. Plaintiffs incorporate the allegations set forth in paragraphs 1 through 23, inclusive,

1 as though fully set forth herein.

2 25. Plaintiffs are informed and believe that based upon discussion with counsel for  
3 Appian that on or about the year 2000, Defendant Appian hired defendant Humann to  
4 prepare civil engineering plans and specifications for the design and construction of  
5 two single family residences, one of which is on the Subject Property and the other  
6 is on the lot next door to the Subject Property. The scope of this work included  
7 preparation of the grading and drainage plans for both the Subject Property and the  
8 property next door to the Subject Property, and to oversee portions of the  
9 construction. Plaintiffs are informed and believe that defendants Humann and Does  
10 11-20 were hired on an oral contract basis, that no written contract exists, and that  
11 Appian paid Humann and Does 11-20 on a time and material basis to prepare the  
12 grading and drainage plans for the development of both the Subject Property and the  
13 property next door to the Subject Property.

14 26. Utilizing the grading and drainage plans prepared by Humann, defendant Monticello  
15 developed and Appian constructed a single family residence on each of the two lots,  
16 including the home on the Subject Property. Both properties were developed and  
17 constructed on a speculative basis with the intention of selling the properties upon  
18 completion of construction to a member of the general public, such as plaintiffs  
19 who purchased the Subject Property from 1221 Monticello. Members of the  
20 general public to whom the single family residences were being marketed, including  
21 plaintiffs as the first and only purchasers and residents of the Subject Property, were  
22 intended beneficiaries of the agreement between Humann and Appian with respect to  
23 the quality and suitability of the grading and drainage plans. Plaintiffs were and  
24 continue to be the first and only owners and residents of the Subject Property.

25 27. In so acting, defendants Humann and Does 11-20 owed a duty of care to Plaintiffs to

1 design, engineer, inspect, and oversee the construction of the Subject Property in  
2 accordance with applicable safety and building codes, the standard of care applicable  
3 to their professional design services, and other acceptable standards of the industry.

4 28. Defendant Humann knew or should have known that upon completion, the Subject  
5 Property would be offered for sale to the general public. Defendant Humann knew  
6 or should have known that persons such as plaintiffs, as members of the general  
7 public to whom the single family homes were being marketed, would suffer damages  
8 if Humann designed, engineered, or oversaw construction in a manner which fell  
9 below the applicable standard of care and did not comply with applicable safety and  
10 building codes and other applicable standards of the industry. Defendant Humann  
11 knew or should have foreseen that plaintiffs, as members of the general public to  
12 whom the single family homes were being marketed, would suffer damages if  
13 Humann designed, engineered, or oversaw construction in a manner which fell below  
14 the applicable standard of care applicable to their professional design services.

15 29. Defendants Humann and Does 11-20, and each of them, breached their duty of care  
16 to Plaintiffs, who are and continue to be the only residents and owner of the Subject  
17 Property, by failing to act according to the standard of care for civil engineers, in  
18 accordance with the plans and specifications, and applicable safety and building  
19 codes. As a direct and proximate result of such breach, the Subject Property suffers  
20 from numerous defects alleged attributable to Humann and Does 11-20's actions,  
21 including, but not limited to:

22 a. There is an inadequate perimeter subdrain around the Subject Property to  
23 collect and carry subsurface water away from the foundation support soils,  
24 which was a substantial factor in bringing about the failure of the foundation  
25 systems at the Subject Property, causing walls and floors to shift and move,

1 the walls and floors and improvements attached thereto to break, crack,  
2 and/or crumble, windows and doors not to operate properly, floors and walls  
3 to be out of level and plumb, and retaining walls and concrete flatwork to  
4 move.

5 b. There is an inadequate drainage system around the perimeter of the house to  
6 collect or carry surface water away from the foundation support soils, which  
7 was a substantial factor in bringing about the failure of the foundation  
8 systems at the Subject Property, causing walls and floors to shift and move,  
9 the walls and floors and improvements attached thereto to break, crack,  
10 and/or crumble, windows and doors not to operate properly, floors and walls  
11 to be out of level and plumb, and retaining walls and concrete flatwork to  
12 move.

13 c. There are no adequate provisions to properly collect and remove surface  
14 water runoff uphill and adjacent to the Subject Property. The excess surface  
15 water was a substantial factor in bringing about the failure of the foundation  
16 systems at the Subject Property, causing walls and floors to shift and move,  
17 the walls and floors and improvements attached thereto to break, crack,  
18 and/or crumble, windows and doors not to operate properly, floors and walls  
19 to be out of level and plumb, and retaining walls and concrete flatwork to  
20 move.

21 d. There is inadequate subsurface drainage to drain the Subject Property site  
22 uphill from or adjacent to the Subject Property, which was a substantial  
23 factor in bringing about the failure of the foundation systems at the Subject  
24 Property, causing walls and floors to shift and move, the walls and floors and  
25 improvements attached thereto to break, crack, and/or crumble, windows and  
doors not to operate properly, floors and walls to be out of level and plumb,



1 and retaining walls and concrete flatwork to move.

2 e. There was no provision in Humann's plans for installation of hydraugers,  
3 which were recommended by Diablo Soils, the soils engineer, as set forth in  
4 the soils report. The lack of hydraugers was a substantial factor in bringing  
5 about the failure of the foundation systems at the Subject Property, causing  
6 walls and floors to shift and move, the walls and floors and improvements  
7 attached thereto to break, crack, and/or crumble, windows and doors not to  
8 operate properly, floors and walls to be out of level and plumb, and retaining  
9 walls and concrete flatwork to move.

10 f. At the time of the initial grading of the property, water and inadequate soils  
11 were discovered along the eastern side of the property. Such discovery  
12 necessitated relocating the home to the west and providing additional  
13 drainage to protect the integrity of the structure, yet such changes do not  
14 appear on the as-built plans provided by Humann as required under the  
15 standard of care. The failure of Humann to relocate the home's site and  
16 provide additional drainage was a substantial factor in bringing about the  
17 failure of the foundation systems at the Subject Property, causing walls and  
18 floors to shift and move, the walls and floors and improvements attached  
19 thereto to break, crack, and/or crumble, windows and doors not to operate  
20 properly, floors and walls to be out of level and plumb, and retaining walls  
21 and concrete flatwork to move.

22 g. Defects in construction exist which should have been identified and  
23 corrected upon inspection by Humann.

24 30. As a direct and legal result of the negligence of these defendants, and each of them,  
25 the Subject Property has suffered property damage and is therefore defective, in that  
it suffers from movement caused by the numerous defects set forth above.

1 31. As a further proximate and legal result of the negligence of defendants Humann and  
2 DOES 11-20, and each of them and the resultant property damages, plaintiffs have  
3 incurred, and will continue to incur repair costs, loss of use of and loss of market  
4 value in an amount to be proven at trial.

5 32. As a further proximate and legal result of the negligence of these defendants, and  
6 each of them, and the resultant property damages, plaintiffs have been required to  
7 expend sums to investigate and make temporary repairs to the Property in an amount  
8 to be proven at trial.

9 WHEREFORE, plaintiffs pray judgment against defendants, and each of them, as set  
10 forth below.

11  
12 **FOURTH CAUSE OF ACTION**

13 **(Negligence against HDO and DOES 11-20)**

14 33. Plaintiffs incorporate the allegations set forth in paragraphs 1 through 34, inclusive,  
15 as though fully set forth herein.

16 34. Plaintiffs are informed and believe that on or about May 1, 2000, Defendant Appian  
17 hired defendant HDO as the architect, to prepare the architectural plans for the  
18 construction of two a single family residences, one of which is on the Subject  
19 Property and the other is on the lot next door to the Subject Property, to oversee  
20 construction, and to bear ultimate responsibility for all design plans. A copy of the  
21 contract between HDO and Appian is attached hereto as Exhibit "A". Plaintiffs are  
22 informed and believe based upon discussion with counsel for HDO that although  
23 Exhibit "A" is unsigned, an executed copy of the contract exists and that HDO and  
24 Appian conducted their business relationship under the terms of Exhibit "A".

25 35. Utilizing the architectural plans prepared by HDO, defendant Monticello developed  
and Appian constructed a single family residence on each of the two lots, including



1 the home on the Subject Property. Both properties were developed and constructed  
2 on a speculative basis with the intention of selling the properties upon completion  
3 of construction to a member of the general public, such as plaintiffs who purchased  
4 the Subject Property from 1221 Monticello. Members of the general public to  
5 whom the single family residences were being marketed, including plaintiffs as the  
6 first and only purchasers and residents of the Subject Property, were intended  
7 beneficiaries of the agreement between HDO and Appian with respect to the quality  
8 and suitability of the design and architectural plans. Plaintiffs were and continue to  
9 be the first and only owners and residents of the Subject Property.

10 36. Defendants HDO and Does 11-20 designed, engineered, and/or oversaw  
11 construction of the Subject Property pursuant to the terms of the agreement  
12 between HDO and Appian, and in so acting, HDO owed a duty of care to Plaintiffs to  
13 design, engineer, inspect, and oversee the construction of the Subject Property in  
14 accordance with applicable safety and building codes, the standard of care applicable  
15 to their professional design services, and other acceptable standards of the industry.

16 37. Defendant HDO knew or should have known that upon completion, the Subject  
17 Property would be offered for sale to the general public. The contract between  
18 HDO and Appian (Exhibit "A") recites HDO's "understanding that you [Appian] wish  
19 to develop the parcel with 2 single family homes." Defendant HDO knew or should  
20 have known that persons such as plaintiffs, as members of the general public to  
21 whom the single family homes were being marketed would suffer damages if HDO  
22 designed, engineered, or oversaw construction in a manner which fell below the  
23 applicable standard of care and did not comply with the applicable safety and  
24 building codes, as well as other applicable standards of the industry. Defendant HDO  
25 knew or should have foreseen that plaintiffs, as members of the general public to  
whom the single family homes were being marketed, would suffer damages if HDO

1 designed, engineered, or oversaw construction in a manner which fell below the  
2 applicable standard of care.

3 38. Defendants HDO and Does 11-20, and each of them, breached their duty of care to  
4 Plaintiffs, who continue to be the first and only residents of the Subject Property, by  
5 failing to act according to the standard of care, in designing the Subject Property in  
6 accordance with applicable safety and building codes and the standard of care for the  
7 industry. As a direct and proximate result of such breach, the Subject Property  
8 suffers from the following defects which are attributable to HDO and Does 11-20's  
9 actions, including but not limited to the following:

10 a. There was no provision in HDO's plans for the installation of hydraugers to  
11 de-water the Subject Property, as was recommended by Diablo Soils, the  
12 soils engineer and as specified in the soils report. The lack of hydraugers and  
13 failure to dewater the Subject property was a substantial factor in bringing  
14 about the failure of the foundation systems at the Subject Property, causing  
15 walls and floors to shift and move, the walls and floors and improvements  
16 attached thereto to break, crack, and/or crumble, windows and doors not to  
17 operate properly, floors and walls to be out of level and plumb, and retaining  
18 walls and concrete flatwork to move, all of which require remedial repair or  
19 replacement.

20 b. The overall design of the Subject Property is inappropriate for the site and  
21 many design details are missing from the architectural plans; these defects  
22 were a substantial factor in bringing about the failure of the foundation  
23 systems at the Subject Property, causing walls and floors to shift and move,  
24 the walls and floors and improvements attached thereto to break, crack,  
25 and/or crumble, windows and doors not to operate properly, floors and walls  
to be out of level and plumb, and retaining walls and concrete flatwork to

1 move.

2 c. Discrepancies and inconsistencies exist in the plans prepared by HDO. For  
3 example, no tie beams are specified in the plans, yet a detail exists for tie  
4 beams, the lack of which was a substantial factor in bringing about the failure  
5 of the foundation systems at the Subject Property, causing walls and floors to  
6 shift and move, the walls and floors and improvements attached thereto to  
7 break, crack, and/or crumble, windows and doors not to operate properly,  
8 floors and walls to be out of level and plumb, and retaining walls and concrete  
9 flatwork to move.

10 d. The overall foundation design was inadequate, which was a substantial factor  
11 in bringing about the failure of the foundation systems at the Subject  
12 Property, causing walls and floors to shift and move, the walls and floors and  
13 improvements attached thereto to break, crack, and/or crumble, windows and  
14 doors not to operate properly, floors and walls to be out of level and plumb,  
15 and retaining walls and concrete flatwork to move.

16 e. Defects in construction exist which should have been identified and  
17 corrected by HDO ; the failure of HDO to identify and correct these  
18 construction defects was a substantial factor in bringing about the failure of  
19 the foundation systems at the Subject Property, causing walls and floors to  
20 shift and move, the walls and floors and improvements attached thereto to  
21 break, crack, and/or crumble, windows and doors not to operate properly,  
22 floors and walls to be out of level and plumb, and retaining walls and concrete  
23 flatwork to move.

24 39. As a direct and legal result of the negligence of these defendants, and each of them,  
25 the Subject Property has suffered property damage and is therefore defective.

Plaintiffs have been, and continue to suffer damages in an amount to be proven at

1 trial.

2 40. As a further proximate and legal result of the negligence of defendants HDO and  
3 DOES 11-20, and each of them, and the resultant property damages, plaintiffs have  
4 incurred, and will continue to incur repair costs, loss of use of, and loss of market  
5 value in an amount to be proven at trial.

6 41. As a further proximate and legal result of the negligence of these defendants, and  
7 each of them, and the resultant property damages, plaintiffs have been required to  
8 expend sums to investigate and make temporary repairs to the Property in an amount  
9 to be proven at trial.

10 WHEREFORE, plaintiffs pray judgment against defendants, and each of them, as set  
11 forth below.

12  
13 **FIFTH CAUSE OF ACTION**

14 **(Strict Liability against Appian)**

15 42. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 43 of  
16 this complaint as set forth fully herein.

17 43. Plaintiffs are informed and believe, and based on that information and belief allege,  
18 that defendants, and each of them, developed, manufactured, constructed, and  
19 supplied products to the property, and/or sold the Subject Property as part of their  
20 business in which they actively designed, developed, and constructed residential lots  
21 and dwellings units for sale to the consuming public, including the home purchased  
22 by plaintiffs.

23 44. Plaintiffs are informed and believe, and based on that information and belief allege,  
24 that defendants, and each of them, knew, and intended, that each of the residential  
25 units, including plaintiffs' home and property would be purchased and used without  
substantial inspection for defects.

1 45. In acquiring the Subject Property and home, plaintiffs reasonably and necessarily  
2 relied upon the skill of defendants and reasonably expected that the property would  
3 be free from defects, and reasonably fit for long-term habitation and other expected  
4 uses of the property.

5 46. Plaintiffs are informed and believe, and based on that information and belief allege,  
6 that the property is defective in design and construction and that the property is unfit  
7 and unsafe for its intended purpose, in that the house and property suffers from  
8 numerous defects, the most prominent of which includes the failure of part or all of  
9 the foundation systems causing the walls and floors to shift and move, the walls and  
10 floors and improvements attached thereto to break, crack, and/or crumble, windows  
11 and doors to not properly operate, floors and walls to be out of level and plumb, all  
12 due to defendants' failure to ensure that the soil was adequately graded and  
13 compacted, failure to provide adequate pier support and foundation, failure to  
14 comply with applicable building codes and with the plans and specifications, as the  
15 case may be. Other defects exist in the property which plaintiffs have yet to  
16 discover.

17 47. Defendants, and each of them, knew or should have known of these defects and  
18 failed to warn plaintiffs of the defective condition of the property, and are therefore  
19 strictly liable for the injuries and damages sustained by plaintiffs.

20 48. As a direct and legal result of the above-described defects, the Subject Property has  
21 been, and continues to be, damaged in an amount to be proven at trial.

22 49. As a further direct and legal result of the above-described defects, plaintiffs will  
23 incur and have incurred repair costs, loss of use of the Subject Property, and loss of  
24 market value of the Subject Property, in an amount to be proven at trial.

25 50. As a further direct and legal result of the above-described defects, plaintiffs have  
been required to expend sums to investigate and make temporary repairs to the



1 property in an amount to be proven at trial.

2 WHEREFORE, plaintiffs pray judgment against defendants, and each of them, as set  
3 forth below.

4  
5 **SIXTH CAUSE OF ACTION**

6 **(Breach of Contract as against 1221 Monticello and Does 1-10)**

7 51. Plaintiffs incorporate the allegations of paragraphs 1 through 52 as though set forth  
8 fully herein.

9 52. Plaintiffs entered into a written contract with defendant 1221 Monticello for the  
10 purchase of the Subject Property on February 11, 2002. The purchase price for the  
11 property was \$1,475,000.00. In that written contract, defendant expressly and  
12 impliedly represented and warranted that the Subject Property and all component  
13 parts were designed and constructed according to the plans and specifications and in  
14 a workmanlike manner, was in good and marketable condition, free from defects,  
15 habitable, and suited for its intended purpose as a residential home.

16 53. Defendant breached the contract by selling to plaintiffs a property which has  
17 numerous and significant defects as herein alleged, and which defects significantly  
18 affect the value and desirability of the property, constitutes a significant failure of  
19 consideration on the part of defendant seller, and that as such the property is not  
20 marketable, not free from defects, not habitable, and not suited for its intended  
21 purpose.

22 54. As a direct and legal result of the above-described defects, the Subject Property has  
23 been, and continues to be, damaged in an amount to be proven at trial.

24 55. As a further direct and legal result of the above-described defects, plaintiffs will  
25 incur and have incurred repair costs, loss of use and loss of market value in an  
amount to be proven at trial.

1 56. As a further direct and legal result of the above-described defects, plaintiffs have  
2 been required to expend sums to investigate and make temporary repairs to the  
3 property in an amount to be proven at trial.

4 57. The contract between plaintiffs and defendant Appian provides for recovery of  
5 attorney's fees, which plaintiffs seek in this action for breach of contract by  
6 defendant.


7 WHEREFORE, plaintiffs pray for judgment against defendants, and each of them, as  
8 set forth below:

9  
10 **P R A Y E R**

- 11 1. For general damages in an amount to be proven at trial;  
12 2. For special damages in an amount to be proven at trial, including, but not  
13 limited to, investigation costs, relocation costs, costs of repair, loss of  
14 market value, and loss of use;  
15 3. For attorney's fees according to proof;  
16 4. For costs of suit;  
17 5. For prejudgment interest; and  
18 6. For any further relief the court considers just and proper.

19  
20 Date: October 1, 2007

By:

  
CRAIG L. JUDSON



Sep-17-07 12:18pm From:GORDON &amp; REES 2

416 9868064

T-432 P.003/006 F-489



May 1, 2000

Mr. Vesty Enea  
Appian Homes  
1485 Enea Court, Suite 1480  
Concord, Ca. 94520-5228

Dear Mr. Enea;

We are pleased to provide you with the following proposal for architectural services in connection with your project located on Los Arabis in Lafayette, California.

It is our understanding that you wish to develop the parcel with 2 single family homes. It is also our understanding that the working drawings for these homes will be a "Builders Sets" which means that we will only detail the exterior of the homes.

The architectural services, as outlined below, are meant to fulfill your requirements, and those of the City of Lafayette and other regulatory bodies having jurisdiction over the proposed development.

Services to be performed by the Architect are as follows:

**DESIGN PHASE:**

1. **ARCHITECTURE:** We will prepare a site plan, floor plans, elevations, sketches and other drawings as may be necessary in defining the scope and to fix and describe the size and character of the Project as to architectural style, materials and such other elements as may be appropriate.

Remuneration for the above described design phase services shall be billed "Time and materials" per the attached hourly rate schedule.

**CONSTRUCTION DOCUMENT PHASE:**

1. **ARCHITECTURE:** We will prepare a "Builders Set" of architectural construction drawings for the building that will include all necessary drawings and details. It is our understanding that the Structural, Mechanical and Electrical designs and drawings will

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T-492 P.004/008 F-498

be by other consultants hired by you, or "Design Build".

2. All interior information including interior elevations, all finish detailing and specifications are not a part of this proposal and will be by the builder. Reflected ceiling plans are included as a part of the scope.
3. **COORDINATION:** We will provide coordination of all other Consultants retained by the Client.

For the purposes of this proposal, "coordination" shall be defined as providing other consultants retained by the Client with information, requested by the Client or consultant to the best of the Architects ability at the time of the request.

Remuneration for the above described construction document phase services shall be in the amount of \$12,750.00 per plan for the two "Builders sets" of drawings.

#### CONSTRUCTION ADMINISTRATION PHASE:

1. On an as requested basis.

Remuneration for the above described construction administration phase services shall be billed "Time and materials" per the attached hourly rate schedule.

Services not listed above, are not a part of this proposal. This proposal is for Architectural services only. Structural, Mechanical, Electrical, Civil, Soils Engineering, Traffic Studies, Environmental Impact Studies, Acoustical Studies, architectural renderings or other such non-architectural services are not a part of this proposal.

Payments to the Architect are to be made as per the attached payment schedule. Invoices are due and payable 5 days after the date on the invoice. Invoices past due more than 30 days shall bear interest at the rate of 1% per month.

Additional services requested by the Client will be provided by the Architect at our hourly rates, or at our cost plus 10%, which ever is applicable.

The following are the supplemental General Conditions of this proposal and the Client and the Architect agree as follows:

1. The Client shall furnish to the Architect all maps, contours, boundaries, easements, tree locations and grading information. The Client shall be responsible for all soils tests and Civil engineering required for the project. The Client shall be responsible for traffic studies, impact reports and other such items as may be required for approval. The Client shall be responsible for filing the required documents to secure approval of all agencies having jurisdiction over the project.
2. The Architect shall provide the Client with progress prints as required by the Client.

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Computer plots will be billed at \$10.00 each. Printing and shipping cost shall be billed to the Client at our cost plus 10%.

3. If, after a scheme has been approved, the Client makes a decision, which for its proper execution involves additional services by the Architect; the Client will remunerate the Architect for such additional service.
4. The agreement may be terminated by either party upon written notice. Client agrees to remunerate the Architect for his services to date of notification.
5. The ownership of drawings, as instruments of service, shall be that of the Architect whether the work for which they were made is executed or not. However, the Client may use all or portions of the plans and specifications, at his discretion, at no additional cost, if all reference to the Architect is removed from the documents and the Architect is held harmless for the use of said documents.
6. The Architect shall not have control or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the work.
7. The Architect shall not be responsible for construction cost estimates for this project.

If you are in agreement with the foregoing proposal, please acknowledge where indicated and return one copy to our office.

Thank you for the privilege of being of service.

Sincerely,

HDO Architects-Planners

Randall Harris, Architect

APPROVED:

By: \_\_\_\_\_  
Vesty Enea

Date: \_\_\_\_\_

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T-492 P.008/008 F-498

May 1, 2000

Mr. Vesty Enea  
Appian Homes  
1485 Enea Court, Suite 1480  
Concord, Ca. 94520-5228

**HOURLY RATE SCHEDULE**

Principal Architect: ..... \$115.00 per Hour  
Project Architect: ..... \$95.00 per Hour  
Project Managers ..... \$75.00 per Hour  
Draftsmen: ..... \$65.00 per Hour  
All other: ..... \$40.00 per Hour

**PAYMENT SCHEDULE**

The following is the agreed payment schedule for Architectural services in connection with your project.

1. DESIGN PHASE: Time and materials to be billed monthly.
2. CONSTRUCTION DOCUMENTS: To be billed monthly in proportion to the amount of work completed.
3. CONSTRUCTION ADMINISTRATION PHASE: Time and materials to be billed monthly.